

ROBERT D. UPTON AND WILLIAM C. NEILS

IBLA 78-603 Decided November 15, 1978

Appeal from decision of New Mexico State Office, Bureau of Land Management, declaring Lucky Jay Nos. 5-16 lode mining claims (NM MC 10361 through 10372) null and void ab initio.

Set aside and remanded.

1. Mining Claims: Lands Subject to—Mining Claims: Power Site Lands—Mining Claims: Withdrawn Land—Mining Claims Rights Restoration Act—Withdrawals and Reservations: Effect of—Withdrawals and Reservations: Power Sites

Lands withdrawn for a power site reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States and subject to the conditions in the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

APPEARANCES: V. Lee Vesely, Esq., Silver City, New Mexico and Mark A. Nesvig, Esq., of Powers, Ehrenreich, Boutell & Kurn, Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Robert D. Upton and Gene Boultinghouse filed location notices for Lucky Jay Nos. 5-16 lode mining claims, NM MC 10361 through NM MC 10372 in August and November of 1977, in the New Mexico State Office, Bureau of Land Management (BLM). 1/ The interest of Gene

1/ Location notices were also filed for the Blue Bessy Nos. 1 and 2 mining claims; however, these claims are not involved in this appeal.

Boultinghouse in these claims has been transferred to William C. Neils, in accordance with 43 CFR 3833.3.

In a decision dated July 28, 1978, BLM declared the claims null and void ab initio because the land on which the claims are located ^{2/} are included in a withdrawal for Power Site Reserve No. 759, established November 22, 1924. ^{3/} Upton and Neils have appealed that decision to the Board of Land Appeals.

In their statement of reasons, appellants urge several grounds for reversal. They point out that in the 54 years since the withdrawal "no action whatsoever has even been taken to activate such power site or reservoir," and maintain that continuation of the withdrawn status is unreasonable. They state that the mineral on the claims is used in pollution control devices and valuable in the area. They refer to other mines in the area which have not been interfered with by BLM. Appellants cite their investment in the property in reliance on inaction by BLM between November 1977 and July 1978 as a basis for estoppel. Finally, appellants rely on the Mining Claims Rights Restoration Act, 30 U.S.C. § 621 (1976), section (a) of which provides in pertinent part:

All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims * * *. Provided, That all power rights to such lands shall be retained by the United States: * * * And provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

Paragraph (b) of the Act, 30 U.S.C. § 621 (1976), provides a procedure whereby the Secretary can determine whether placer mining should be prohibited, permitted, or permitted subject to restoration of the surface. This procedure was not complied with here.

^{2/} The land involved in this appeal is located in secs. 29, 30, 31, and 32, T. 14 S., R. 16 W., New Mexico principal meridian.

^{3/} There have been several partial revocations of this Power Site Reservation, none of which affect the land in question.

[1] There is no indication in either the record in this case or the BLM decision that these lands are included in any project licensed by the Federal Power Commission or are under consideration for such a project. Under the Mining Claims Rights Restoration Act, lands withdrawn for a power site reservation are open to entry for location and patent of mining claims subject to the conditions of the Act. United States v. Mineral Economics Corp., 34 IBLA 258 (1978); Henry Stagnaro, 31 IBLA 357 (1977). Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and remanded for appropriate action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

Joan B. Thompson
Administrative Judge

We concur.

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

